

LETTER OPINION
95-L-29

February 10, 1995

Ms. Jeanne L. McLean Behrens
Bottineau County State's Attorney
314 West 5th Street
Bottineau, ND 58318

Dear Ms. McLean Behrens:

Thank you for your letter. You asked 1) what procedure a person should use to protest a drain assessment made under N.D.C.C. ch. 61-16.1 after the person has paid the special assessment to the county treasurer under protest and 2) what the county treasurer should do with the protest money being held in a segregated account.

N.D.C.C. ?? 57-20-20 and 57-20-21 provide:

57-20-20. Payment of tax under protest. Any person against whom any tax is levied, or who may be required to pay the same, may pay such tax under protest to the county treasurer, by giving notice in writing to such treasurer at the time of payment, specifying the reasons for such protest, and thereafter, within sixty days, he may apply in writing to the board of county commissioners for an abatement, adjustment, or refund of taxes thus paid, or any portion thereof, and if such application is rejected, in whole or in part, or if the board fails to act upon his application within sixty days, it shall notify the applicant of the disposition of his application and of his right to appeal as provided by law. The application to the board of county commissioners must show the post-office address of the taxpayer and notice to such address by registered or certified mail is sufficient service of the notice of rejection or approval of the taxpayer's application.

57-20-21. Segregation of taxes paid under protest. Whenever taxes have been paid under protest, the county treasurer shall keep money thus

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paid and collected in a separate fund known as "taxes paid under protest fund" and such moneys may not be paid or disbursed to the state, to any fund of the county, nor to any local taxing district, until the period prescribed in section 57-20-20 has expired, and in case an action is commenced, the county treasurer shall retain in such fund, until such action is finally determined, that part or portion of the tax paid under protest which the plaintiff in his complaint contends is invalid or illegal.

In a letter dated March 15, 1993, to the Richland County Treasurer, chief counsel to the Tax Commissioner recommended that because N.D.C.C. ch. 61-16.1 does not contain any specific procedure for the maintenance of protest accounts, such accounts should be created similar to those required under N.D.C.C. ? 57-20-21. I agree that drain special assessments paid under protest should be maintained in separate accounts similar to that required in N.D.C.C. ? 57-20-21. The remedy contained in N.D.C.C. ? 57-20-20, however, does not apply to taxpayers who are dissatisfied with special assessments on drains. N.D.C.C. ? 57-20-20 requires a taxpayer to apply to the board of county commissioners for an abatement, adjustment, or refund. It would be inappropriate for the board of county commissioners to order adjustments, abatements, or refunds of special assessments imposed by a water resource district under ch. 61-16.1. The remedy of a taxpayer who is dissatisfied with the special assessment made on a drain is found in N.D.C.C. ch. 61-16.1. The taxpayer may either appeal to the state engineer under N.D.C.C. ? 61-16.1-23 or to district court under N.D.C.C. ? 61-16.1-54. If fraud or bad faith is alleged, a taxpayer may have a remedy in a judicial proceeding outside of the appeals provided in N.D.C.C. ch. 61-16.1. Amerada Hess Corp. v. Furlong Oil and Minerals, 348 N.W.2d 913, 917 (N.D. 1984).

N.D.C.C. ? 61-16.1-23 provides that affected landowners and any political subdivision subject to assessment, having not less than 25 percent of the possible votes, who or which believes the assessment has not been fairly or equitably made or that the project is not properly located or designed, may petition the state engineer, within ten days after the hearing

on assessments, to make a review of the assessments and to examine the location and design of the proposed project. The state engineer is required to examine the lands assessed and the location and design of the proposed project. If the assessments have not been made equitably, the state engineer can correct them. The state engineer's correction and adjustment is final. If the state engineer determines the project has been improperly located or designed, the state engineer may order a relocation and redesign. A landowner or political subdivision claiming that the landowner or political subdivision will receive no benefit from the project may appeal to the state engineer within ten days after the hearing on the assessments. The state engineer may not determine the specific amount of benefits upon appeal but only if there is a benefit. The determination of the state engineer is not appealable but may be reviewed under special proceedings. Investment Rarities v. Bottineau County Water Resource District, 396 N.W.2d 746, 748 (N.D. 1986).

In lieu of an appeal to the state engineer under N.D.C.C. ? 61-16.1-23, a person aggrieved by a decision of a water resource district may appeal under N.D.C.C. ? 61-16.1-54 to the district court in accordance with N.D.C.C. ? 28-34-01. Investment Rarities at 748. Under N.D.C.C. ? 28-34-01, the notice of appeal must be filed within thirty days after the decision of the water resource district to confirm the assessments pursuant to N.D.C.C. ? 61-16.1-22.

You told a member of my staff the assessments were confirmed by the water resource district several years ago, but the imposition of the special assessments began only recently. Because the decision of the board was not appealed in a timely manner, and unless a taxpayer has filed an action against the district, the money held in the segregated account should be transferred to the project fund to be used for project expenses. If a taxpayer has filed a lawsuit, the money the taxpayer paid under protest which the taxpayer claims is invalid or illegal should be held in a segregated account until the matter is resolved by the court.

N.D.C.C. ? 61-16.1-32¹ implies that in addition to the remedy

¹ N.D.C.C. ? 61-16.1-32 provides:

Collection of tax or assessment levied not to be enjoined or declared void - Exceptions. The collection of any tax or assessment levied or ordered to be levied to pay for the location and construction of any project under the provisions of this chapter shall not be

of appealing a decision to either the state engineer or the district court, an action can be brought to reverse, declare void, or enjoin the proceedings by which a drain project was established. North Dakota case law, however, reveals that N.D.C.C. ? 61-16.1-32 does not give the taxpayer another remedy. In Chester v. Einerson, 34 N.W.2d 418 (1948), the North Dakota Supreme Court refused to allow a suit for injunctive relief. This case involved an action to enjoin the county commissioners from building a drain. The injunction was denied and the plaintiffs appealed. No statutory appeal had been taken from the commission's initial decision to construct a drain. The supreme court held that the statutory appeal was an adequate remedy for reviewing the decision of the board and denied the injunction. The court said:

Where the law provides an appeal from an order or determination of a board or commission whereby the correctness and validity of the order or decision may be reviewed the remedy so provided, if adequate, must be pursued and a party having the right of appeal may not disregard the remedy and obtain injunctive relief against the enforcement of the

enjoined perpetually or absolutely declared void by reason of any of the following:

1. Any error of any officer or board in the location and establishment thereof.
2. Any error or informality appearing in the record of the proceedings by which any project was established.
3. A lack of any proper conveyance or condemnation of the right of way.

The court in which any proceeding is brought to reverse or declare void the proceedings by which any project has been established, or to enjoin the tax levied to pay therefor, on application of either party, shall order examination of the premises, or survey of the same, or both, as may be deemed necessary. The court, on a final hearing, shall enter an order which is just and equitable, and may order the tax or any part thereof to remain on the tax lists for collection, or if the tax were paid under protest, may order, if justice requires, the whole or any part thereof to be refunded. The costs of such proceedings shall be apportioned among the parties as justice may require.

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order or decision.

Id. at 427-28. See also Amerada Hess Corp., 348 N.W.2d 913, 917 (in the absence of fraud or bad faith, the order of the public service commission acting within its jurisdiction under authority of law is not subject to collateral attack, the only method of attack available being an appeal as provided by statute).

You also asked whether the county treasurer should be advising a taxpayer on what the taxpayer should do to protest an assessment. Giving advice would be outside the treasurer's responsibilities and duties and could be considered practicing law without a license which is prohibited under N.D.C.C. ? 27-11-01.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

jak/mh